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IN THE HONRABLE HIGH COURT OF JUDICATURE AT BILASPU

CRI. A. No:- 709 /2002. [S...B.]

Appealant:- Doctor Nishad s/o Pusanaged-38 yrs
(In jail) R/o near Danganiya Tank, Kumhari
P,S. Bhilai Distt- Durg.

VERSUS

Respondant;- State of C.G..

2645
Filed on 21-3-02
by Shri Abhay Tiwari Advocate
R to D.K.

Appeal under section –374 of Criminal , Procedure , Code.

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri **DILIP RAOSAHEB DESHMUKH, J.**

Criminal Appeal Number-708/2002

Doctor Nishad

Vs.

State of Chhattisgarh

PRESENT: -

Shri Abhay Tiwari, learned counsel for the appellant.
Shri Ashish Shukla, Govt. Advocate for the State.

J U D G M E N T
(Delivered on 29-06-2006)

This appeal is directed against the judgment dated 15-06-2002 delivered by Shri A.S.Chandel, VIth Additional Sessions Judge, Durg in Sessions Trial Number-34/2002 whereby the appellant was convicted under Section-376 of IPC and was sentenced to undergo rigorous imprisonment for ten years and to a fine of Rs. 500/- and in default of payment of fine to undergo additional rigorous imprisonment for six months.

2. The appellant had in his examination under Section 313 of Cr.P.C. admitted that the prosecutrix aged six years visited his house in the afternoon on 21-11-2001. It is not disputed that Dhaneshwari Bai daughter in-law of the appellant had taken the prosecutrix to her house. During the course of arguments, it was also not disputed that prosecutrix had sustained injury and bleeding on her private parts on 21-11-2001.

3. Briefly stated the prosecution story is that on 21-11-2001 the prosecutrix, aged six years went to play at the house of the appellant. The appellant made her lie on the bed and after removing her underwear committed rape on her. Severe bleeding started from the vagina of the

prosecutrix. Dhaneshwari Bai, daughter-in-law of the appellant took the prosecutrix to her mother Jayanti Bai PW-1. The prosecutrix informed her mother about the commission of rape by the appellant. Dr. Sushil Kumar Soni PW-13 give first aid to the prosecutrix and found that severe bleeding had occurred from the vaginal orifice of the prosecutrix. Hymen was torn. The prosecutrix told him that the appellant had sexually assaulted her.

4. F.I.R. vide Ex. P-1 was lodged by mother of the prosecutrix Jayanti Bai PW-1 at police outpost Kumhari at 7.20 P.M. on the same day. On medical examination of the prosecutrix at 11.30 P.M. Dr. Madhu Shrivastava PW-10 found that the prosecutrix was bleeding from her vagina. Since the prosecutrix was not allowing local examination it was done under general anesthesia. It was found that there was a vaginal tear of second degree $1\frac{1}{2}$ Cm. in size at 5 'O' clock position extending to 1 Cm. of perineum with fresh bleeding. Wound was repaired. It was opined that sexual intercourse might have been done with the prosecutrix within 12 hours. The appellant was also examined on 22-11-2001 at 12.30 P.M. by Dr. Shrinivas Choubey PW-11 who found the appellant capable of performing sexual intercourse. Smegma was absent from penis. It was opined that sexual intercourse could have been performed within 48 hours of the examination. After completion of investigation, the appellant was prosecuted under Section 376 of IPC.

5. The appellant abjured the guilt and pleaded innocence. In defence, it was pleaded that the prosecutrix had sustained injury by hammer. Shankar DW-1 was examined in defence who deposed that the prosecutrix had told that she had sustained the injury at the house of the appellant due to fall. The prosecution examined as many as 14 witnesses. Relying upon the

evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellant as aforesaid in para-1.

6. Shri Abhay Tiwari, learned counsel for the appellant has assailed the conviction of the appellant on the ground that the possibility that the prosecutrix had sustained the vaginal injury due to fall on hammer could not be ruled out in view of her admission in para-2 that the appellant had asked her to bring chisel and hammer. It was also contended that the very fact that Dhaneshwari Bai daughter-in-law of the appellant was present in the house of the appellant and had taken the prosecutrix to her house when vaginal bleeding had occurred and the fact that the Dr. Sushil Kumar Soni PW-13 was called by the appellant to give first aid to the prosecutrix, substantiated the defence of the appellant. It was also argued that independent witnesses Pushpa PW-2, Chanda Bai PW-3 did not support the prosecution story. Lastly, it was contended that Dr. Madhu Shrivastava PW-10 had admitted in cross examination para-4 that the vaginal injury sustained by the prosecutrix could be caused by a hard and blunt object. Reliance was placed on ***Rahim Beg Vs. State of U.P.*** reported in ***A.I.R. 1973 S.C. 343*** while contending that absence of injury on male organ of the accused pointed to his innocence.

7. Shri Ashish Shukla, learned Govt. Advocate, on the other hand, argued in the support of the impugned judgment.

8. Having heard rival contentions, I have perused the record. Prosecutrix PW-2 has deposed that in the afternoon on the date of occurrence she had gone to the house of the appellant where the appellant had asked her to bring chisel and hammer. Thereafter, the appellant made her to lie down inside the house and removed her underwear and committed

sexual intercourse with her due to which she started bleeding from her private parts. She also stated that she had objected to the sexual assault by the appellant. The learned trial Judge has noted the demeanor of the witnesses that while deposing the above facts she started to cry on looking at the appellant in Court and felt afraid of the appellant. In her cross examination the prosecutrix was not asked whether she had sustained the injury on her private parts due to fall on the hammer. It was neither suggested in cross-examination nor in the defence taken by the appellant that while the appellant asked the prosecutrix to give him a hammer she fell down on the hammer. This defence also does not appear to be plausible because as suggested by the defence if the appellant was affixing a saree on the terrace of his house while standing on a stool and asked the prosecutrix to give a hammer to him, the prosecutrix could not have in any manner sustained the injury on her private parts due to fall on the hammer. It is also pertinent to note that the appellant in reply to the question no.12 in his examination under Section-313 of Cr.P.C. has clearly stated that he had no knowledge as to how the prosecutrix had sustained the injury on her private parts. It is also noteworthy that in cross-examination of Dr. Madhu Shrivastava PW-10 it was not specifically asked by the defence that the injury sustained by the prosecutrix could have been caused by a fall on a hammer.

9. I have perused the entire evidence available on record minutely. There is not even an iota of evidence even in the form of a suggestion to show that either the mother or the father of the prosecutrix had any axe to grind against the appellant or had any reason to falsely implicate him. The testimony of the prosecutrix is fully corroborated by Dr. Madhu Shrivastava

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PW-10 who stated that she found that the prosecutrix was bleeding from the vagina and was not allowing local examination of her private parts and after administering general anesthesia her private parts were examined and it was found that she had a vaginal tear of second degree, 1 ½ Cm. in size at 5 'O'clock in position extending to 1 Cm. of perineum with fresh bleeding. It was also opined that sexual intercourse with the prosecutrix had been committed within 12 hours prior to her examination. Dr. Sushil Kumar Soni PW-13 admitted that he was called at the house of the prosecutrix at about 3.30 P.M. on 22.11.2001 and found that there was vaginal tear with bleeding. On being cross-examined by the prosecution, he admitted that the prosecutrix had told him that the vaginal tear was attributable to the appellant. Considering the shame of sexual assault on a minor girl aged 6 years and the ignominy following thereafter it cannot be ruled out that the mother of the prosecutrix had told Dr. Sushil Kumar Soni PW-13 that her daughter had got an injury due to a piece of iron while playing because Dr. Sushil Kumar Soni PW-13 has categorically denied the suggestion put forth by the defence that the prosecutrix had told him that she had a fall while playing at the house of the appellant and has specifically said that on his asking the prosecutrix had pointed an accusing finger at the appellant.

10. The testimony of the prosecutrix is also corroborated by her mother Jayanti Bai PW-1 who stated that when Dhaneshwari Bai brought the prosecutrix to her home she had found that her daughter was bleeding from vagina. On being asked, the prosecutrix had told her that the appellant had after making her lie on a chadar committed rape on her. Nothing has emerged in cross examination to rebut her tendency or to show that this witness had any motive to falsely implicate the appellant. The F.I.R. lodged

by Jayanti Bai on the same day vide Ex.P-1 also corroborated the testimony of the prosecutrix in toto.

11. Although Chanda Bai PW-3 and Lata Mishra PW-5 did not support the prosecution story, yet they categorically stated that on going to the house of the prosecutrix they found that mother of the prosecutrix was crying. Dr. Shrinivas Choubey PW-11 who had exmained the appellant on 22.11.2001 at about 12.30 P.M. also did not find any smegma on the penis of the appellant and opined that sexual intercourse could have been committed by the appellant within 48 hours. So far as the case of ***Rahim Beg Vs. State of U.P.*** reported in ***A.I.R. 1973 S.C. 343*** relied on by the learned counsel for the appellant is concerned, the facts and circumstances of the case are clearly distinguishable and do not apply to the present case at all.

12. In ***Madan lal Vs. State of J & K*** reported in ***A.I.R. 1998 SC 386*** it was held by the Apex Court that statement of mother of the prosecutrix that the prosecutrix narrated the entire episode immediately when she arrived home can also be held to be a corroborative piece of evidence. In the present case there was no animus between the prosecutrix and the appellant. The discrepancies in the testimony of the prosecutrix are minor discrepancies and merely by picking up a sentence in cross examination it cannot be ruled that the prosecutrix is not a truthful witness.

13. If the prosecutrix had sustained the injury due to a fall on hammer and Dhanvantari the daughter-in-law of the appellant was present inside the house, she was the best witness for the defence. Had the defence plea been true, the appellant would have examined her as a defence witness because Dhanvantari was the person who took the prosecutrix to her house after the incident. It cannot be ruled out that out of sheer disgust for the

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lustful sexual assault by her father-in-law on a minor girl aged 6 years, she did not enter the witness box as a defence witness.

14. Having thus given my anxious consideration to the evidence led by the prosecution in its entirety and after having scrutinized the evidence of the prosecutrix, I am of the considered opinion that while the testimony of the prosecutrix is truthful, the defence taken by the appellant does not seem to be plausible. The testimony of the prosecutrix is not only natural and worthy of credence but is also corroborated by the testimony of the mother Jayanti Bai PW-1, F.I.R. Ex.P-1 and the medical evidence of Dr. Madhu Shrivastava PW-10 and Dr. Sushil Kumar Soni PW-13. In this view of the matter, conviction of the appellant under Section-376 of the IPC and the sentence awarded thereunder by the learned trial Judge is well founded and does not call for any interference.

15. In the result, this appeal being devoid of merit fails and is dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge